



## **FEDERAL MEDIATION AND CONCILIATION SERVICE**

**2100 K Street, N.W.  
Washington, D.C. 20427**

November 6, 2000

Jeffrey M. Senger, Esq.  
Deputy Senior Counsel for Dispute Resolution  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Room 4328  
Washington, D.C., 20530

Dear Mr. Senger:

Please consider this letter to be the official submission of commentary by the Federal Mediation & Conciliation Service (FMCS) on two documents published in the September 27, 2000 Federal Register: "Confidentiality in Federal Alternative Dispute Resolution Programs" and "Evaluation of Federal Alternative Dispute Resolution Programs". The documents, created by the Federal ADR Steering Committee and designed to assist federal agencies in developing alternative dispute resolution programs, were included in the notice promulgated by the Department of Justice/Federal Alternative Dispute Resolution Council.

FMCS is a unique federal agency with over fifty years of experience in the resolution of labor-management disputes. FMCS is one of only two agencies in the federal government that has conflict resolution as its primary mission. (The other is the National Mediation Board, which resolves disputes in the air and railway transportation industries). In recent decades, FMCS' mandate has expanded significantly in response to the changing needs of the U.S. economy and the growing awareness that FMCS' dispute resolution techniques can be successfully applied to many situations beyond the labor-management context. In particular, through legislation, federal agency regulations, executive orders, and agreements with other federal agencies, FMCS has for many years provided expert services as outside third party neutrals, ADR systems designers, and ADR providers throughout the federal government.

FMCS supports all efforts that promote and encourage the growth of Federal ADR programs. Employing over 200 full time mediators, FMCS has assisted labor and management in the public, private, and federal sectors with negotiated rulemaking, EEO-dispute resolution, systems design and evaluation, mediation and facilitation, and training. While the Administrative Dispute Resolution Act (ADRA) of 1996 has been a major encouragement for the growth

of ADR in many federal agencies, issuance of the proposed guidance at this time would be detrimental to the proliferation of Federal ADR programs. Accordingly, FMCS respectfully requests that the guidance as currently written not be issued.

Confidentiality, acceptability, professionalism, and impartiality are the four cornerstones of the success of mediation, facilitation and other ADR processes. FMCS cannot endorse limitations to these foundations. They all are critical to the effective use, and growth, of ADR. Without question, avoiding loss of evidence for judicial and administrative proceedings, and promoting public access to information for accountability and decision-making in a democratic society are also important goals. Yet potential conflicts exist among these objectives. Impact on these objectives is not equally significant. Specifically, if confidentiality is lost, the parties faith in the process will be likely diminished, and with it, the use of mediation. Given our mission, promotion of the effective use of mediation and other forms of ADR are, to us, the most important.

Moreover, FMCS strongly supports inclusive decision-making processes. Detailed guidance on a model confidentiality statement suitable for use by neutrals in federal ADR proceedings has broad reaching implications. Prior to promulgating any regulatory pronouncements, we suggest the comments of all ADR providers, including those beyond the federal government be considered. For example, states, private providers, and interested professional associations may provide additional information and commentary to further the discussion on these issues. Any impact on the parties' assurances of confidentiality, especially in joint sessions, will be devastating to the use of mediation. Issuing official guidance prior to broad consultation with all interested parties could inhibit the use of mediation.

The ADRA as it presently exists provides an important and functional working foundation and indeed has been the basis for the resolution of many disputes. The statute in its current form continually helps to resolve conflict by creating an atmosphere where all parties feel comfortable making statements. This should not be changed.

Additionally, while we support efforts to develop criteria for ADR efforts, it is premature to issue the "evaluation" document at this time. First, more research is needed and more case study reviews necessary before any such criteria are issued. Second, while we endorse the use of standards as consistent with the obligations of all Federal agencies under the Government Performance and Results Act (P.L. 103-62), there are many ways to measure results. For example, definitions can be dispositive, since programs and agencies differ in their definition of what constitutes a case, a dispute, time spent, and processes

used. Again, for these reasons, before any such guidance is issued, efforts and results in the private, state, and even foreign sectors should be reviewed.

Again, we thank you for the opportunity to comment on these two documents. However, it is the view of FMCS, in both cases, that the concepts receive further study and broader input before their issuance.

Sincerely,

A handwritten signature in black ink, appearing to read "G W Buckingham Jr", written in a cursive style.

George W. Buckingham, Jr  
Deputy Director